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No. ——

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ALEXANDER PERUMAL, *et al.*,
Petitioners

v.

SADDLEBACK VALLEY UNIFIED SCHOOL DISTRICT, *et al.*

PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL

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QUESTIONS PRESENTED

Whether the First Amendment free speech rights of public high school students extend to the nondisruptive distribution of nonschool sponsored leaflets, and the purchase of advertising space open to the public generally in a school yearbook, where their speech concerns the activities or purposes of nonschool sponsored groups.

Whether the establishment clause requires censorship of otherwise protected student expression and association on campus, because of the religious content of such expression.

PARTIES TO THE PROCEEDING

In addition to the parties shown in the caption, the parties include the following: Petitioner Frederick Russell Read, by Guardian ad Litem F. Znette Read, and Respondents Kristine Kister, Dore J. Gilbert, Raghu P. Mathur, Louise Adler, and R. Kent Hann, in their official capacities as members of the Board of Education of the Saddleback Valley Unified School District; Dr. Peter Hartman, in his capacity as Superintendent, Saddleback Valley Unified School District, Donald L. Walker, in his capacity as Principal, El Toro High School; and Robert Metz, in his capacity as Principal, Mission Viejo High School.

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v.

SADDLEBACK VALLEY UNIFIED SCHOOL DISTRICT, *et al.*

PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL

Petitioners Alexander Perumal and Frederick Russell Read respectfully petition for a writ of certiorari to review the judgment and opinion of the California Court of Appeal, Fourth District, Division 3.

OPINIONS BELOW

The opinion of the California Court of Appeal (Pet. App. A) is reported at 198 Cal. App. 3d 64, 243 Cal. Rptr. 545 (1988). The order of the California Supreme Court denying review (Pet. App. C) is not reported. The decision of the California Superior Court (Pet. App. D) is not reported.

JURISDICTION

The decision of the California Court of Appeal was entered on January 29, 1988. The California Supreme Court denied review on April 27, 1988 (Pet. App. C) and the judgment of the Court of Appeal therefore became final on May 18, 1988 (Pet. App. B). On July 21, 1988, the time for filing a petition for certiorari was extended to and including August 25, 1988 (Pet. App. E). This Court has jurisdiction pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the U.S. Constitution provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The relevant portions of the State of California Education Code, § 48907, are set forth in Appendix F, at Pet. App. 51a.

Saddleback Valley Unified School District Board Policy Nos. 5145.3 & 6144.1, Board Policy 5133.1, and Administrative Regulation 5133.1, are set forth, in relevant part, in Appendix F, at Pet. App. 51a-53a.

STATEMENT OF THE CASE

1. Saddleback Valley Unified School District ("Saddleback" or "district") is a large public school district in Southern California, serving the cities of Mission Viejo, El Toro, and the smaller communities near these cities. The district operates five high schools, including one at Mission Viejo and one at El Toro.

This case arose out of separate requests by two students (one at each of these two high schools, petitioners Alex Perumal and Russ Read), during the 1984-85 academic year for permission to distribute flyers to other students during lunch hour, in a nondisruptive manner, and in accordance with the district's prescribed time, place and manner regulations. The flyers, or handbills, were entirely student-written and student-produced; they were not published under school authority or with use of school funds. The flyers contained a short religious message and a quotation from the Bible, and invited interested students to attend informal "New Life" Bible studies led by Alex Perumal and Russ Read at their respective campuses, which met once or twice weekly during

the students' lunch hour, on the school lawn or on the outside steps of a school building.[1] (Copies of the actual handbills in question are reproduced in the opinion below. Pet. App. 15a-16a.)

Perumal and Read sought permission to distribute the flyers pursuant to the school district's written policies concerning students' rights to freedom of speech on school grounds.[2] The district's Policy Nos. 5145.3 & 6144.1 recognize the constitutional rights of students "to distribute petitions, circulars, leaflets, newspapers and other

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[1] The lawfulness of the meetings themselves is not at issue here. *Compare Bender* v. *Williamsport Area School District*, 475 U.S. 534 (1986). The school district and school officials concede the right of students to meet as they do, for voluntary, student-led Bible study and prayer on the lawn, during lunch. Superior Court File record (SCF) 328 (respondents' Memorandum of Points and Authorities in Opposition to Petition for Writ of Mandate); SCF 172 (declaration of Superintendent Hartman); SCF 164 (declaration of Asst. Superintendent Harrison); SCF 149 (declaration of Robert Metz, principal, Mission Viejo High School); SCF 143 (declaration of Donald Walker, principal, El Toro High School). Indeed, the district has recognized (as did the court below) that it is the students' constitutional right under the First Amendment to meet togeher and discuss whatever they like. Pet. App. 7a.

The students' meetings were entirely student-initiated and student-led, and were not sponsored by the school in any way. No school personnel attended or participated in the students' Bible studies and discussions. School officials were aware of these meetings, but did not object to them as contrary to school policy or disruptive of the school environment. Neither, however, did the district sponsor the meetings as official school clubs or activities. SCF 148-149. *See also* SCF 328, 172, 164, 143; Pet. App. at 2a-3a, 7a.

[2] The school board's policies require prior submission to the school principal, or his designee, of literature to be distributed on-campus. The principal is required to act on this request within 24 hours, applying the criteria stated in these policies. The system of prior review itself is not challenged here (*Compare Fujishima* v. *Board of Education*, 460 F.2d 1355 (7th Cir. 1972), *with Eisner* v. *Stamford Board of Education*, 440 F.2d 803 (2d Cir. 1971)), nor is it disputed that petitioners took all appropriate steps to comply with the board's prescribed procedures. *Compare Sullivan* v. *Houston Independent School District*, 475 F.2d 1071 (5th Cir. 1973).

printed matter [not published under school authority]," subject only to certain content-neutral time, place and manner regulations (not at issue here), and three specific content limitations—that the material not be legally obscene to minors; that it not be legally libelous; and that it not create "a clear and present danger of the imminent commission of unlawful acts on school premises or the violation of lawful school regulations or the substantial disruption of the orderly operation of the school." SCF 36.[3]

School officials at each school, acting on the basis of instructions by the school board and superintendent, refused permission for petitioners to pass out the flyers. There was no suggestion that the passing out of flyers would be disruptive of the school environment, interfere with the rights of other students, or violate any of the time, place, and manner regulations promulgated by the school to assure order and the protection of the rights of other students. Rather, Perumal and Read were told that, notwithstanding Policy Nos. 5145.3 & 6144.1, the content of their flyers was unacceptable because they constituted "advertisement" for off-campus or private student groups not "approved" by the school, and that this violated School Board Policy No. 5133.1 (SCF 19, 22, 149, 164).

Policy No. 5133.1 states, in pertinent part:

> No off-campus or private clubs are permitted to function in the School. They are also restricted from advertising in any form.
>
> The only clubs and organizations which may use school facilities during the school day are those which are school sponsored. The school day includes nonclassroom time.[4]

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[3] The relevant portions of Policy Nos. 5145.3 & 6144.1 are set forth in Appendix F, Pet. App. 51a-53a.

[4] Administrative Regulation 5133.1, however, provides that Board Policy 5133.1 is to be interpreted in conformity with Policies 5145.3 & 6144.1. SCF 41. Pet. App. 53a.

Perumal and Read were told that, as school authorities interpreted these policies, they were permitted to meet for informal Bible studies and prayer on the school campus, during lunch hour, but prohibited from any form of "advertising" for such meetings, such as the flyers. SCF 143, 149, 172. School officials stated that such a restriction was necessary to comply with the Establishment Clause of the First Amendment (SCF 149), and cited the case of *Johnson v. Huntington Beach Union School District*, 68 Cal. App. 3d 1, 137 Cal. Rptr. 43, *cert. denied for want of jurisdiction*, 434 U.S. 887 (1977), as the basis for their conclusion that Policy No. 5133.1 as applied was a "lawful school regulation" of the students' rights of free expression. SCF 19, 22.

Perumal and Read together submitted a written request to the school board and superintendent, asking that the district place on the agenda of the next board meeting the matter of the denial of the requests to pass out the religious handbills. SCF 20. Perumal and Read were informed by respondents that their requests were denied, and the issue was not placed on the school board agenda.

That same school year, petitioner Read submitted an advertisement for the personal advertisement section in the back of the Mission Viejo High School yearbook. The advertising section is open to anyone wishing to purchase space, and consists of paid advertisements by local businesses and personal messages paid for by parents or students. Pet. App. 7a-8a. *See* Pet. App. 39a (Crosby, J., dissenting) (giving examples). As Photo Editor of the yearbook, Read was entitled by staff policy to submit an advertisement without payment of the $50.00 fee for his one-quarter page advertisement, though he was prepared to pay the $50.00 fee if necessary. SCF 9-10. Read chose to use his advertising space for a photograph of members of the New Life Bible study at his school, with a message welcoming other students' participation, and a quotation from the Bible. School authorities censored the submitted ad, citing Policy 5133.1's prohibition on

advertising by off-campus or private clubs (SCF 31-33) and concerns that Read's ad would violate the establishment clause. SCF 173 (declaration of Superintendent Hartman) ("After reviewing the [yearbook] ad and based on advice from legal counsel, I determined that the ad was a violation of the District Policy and could be a violation of the First Amendment requirement previously discussed with Mr. Read.").

2. Thereafter, Perumal and Read commenced this action in California superior court [5] for a writ of mandate directing school officials to allow distribution of the flyers in accordance with the school's free speech policy, subject to the relevant time, place, and manner regulations, and to allow publication of Read's yearbook ad. The suit also requested damages relief.[6] The school district defended on two grounds: first, that Policy 5133.1, as interpreted to allow the students' lunch hour religious meetings but to forbid leafletting or the yearbook ad, was a permissible school board regulation violating no free speech right of petitioners; and second, that allowing the distribution of the flyers or publication of the yearbook ad would violate the establishment clause.

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[5] The federal questions presented in this petition were raised at each stage of the state court proceedings, either by petitioners as an affirmative ground for relief, or defensively by respondents.

[6] Under California Procedure, a petition for a writ of mandate may include a prayer for damages relief. Code of Civil Procedure (CCP) § 1095; *see* Witkin, 8 *California Procedure* (3d Ed. 1985), § 203 at 831. The procedure is closely analogous to the federal court practice of including claims for both injunctive (equitable) and damages (legal) relief in a single complaint, with the technical difference that, under California Procedure, mandamus is a legal, not equitable remedy (though its function is virtually identical to a mandatory injunction). CCP §§ 1084-1095. Witkin, 8 *California Procedure* at 643-44, § 4, 656-57, § 19 (and sources cited).

While petitioners' personal claims for mandatory relief are moot, their claims for damages present a live controversy. *See, e.g., Hezelwood School District* v. *Kuhlmeier*, 108 S. Ct. 562, 566 (1988); *Tinker* v. *Des Moines Independent School District*, 393 U.S. 503, 504, 514 (1969).

The superior court denied petitioners all relief, without opinion. Its order stated simply: "Petition for Writ of Mandate, damages and attorney fees denied. Each party to bear their own costs." Pet. App. 49a.

The California Court of Appeal affirmed by divided vote, 2-1 (Appendix A Pet. App. 1a-46a), holding that the school district was not obliged to permit the students' literature distribution because the students' meetings were not sponsored by the school district and because the religious content of the students' flyers would violate the establishment clause of the First Amendment and Article I, §§ 4, 24 of the California Constitution.

The majority agreed with the school district that Perumal and Read represented their respective groups of students holding the lunch hour Bible studies, and that these "New Life" groups constituted off-campus or private clubs within the meaning of the school's regulations. Pet. App. 7a. The court concluded that "board policy 5133.[1] is a constitutionally permissible school board regulation" because it "allows only school sponsored activities on its campus." *Id.* at 13a. The court believed that "the fact the board has allowed the students to informally meet is of no moment," but also agreed that the school could not prohibit such "interpersonal communication or informal discussions between students." *Id.* at 7a.

The majority noted that Read's yearbook ad "presents a different issue" and found that "the school opened its advertising section to anyone who wished to purchase space." Pet. App. 7a-8a. However, the court concluded that the school district nonetheless "has chosen a closed forum and only school-sponsored clubs may function *or advertise*." Pet. App. 9a (emphasis in original).

The majority also held that the flyers and the yearbook ad could be prohibited because of the establishment clause and comparable state constitutional provisions. "So long as the district maintains a closed forum policy, it cannot constitutionally recognize New Life groups as school

sponsored clubs. The groups without such recognition may not hand out the flyers on campus nor may they advertise in the yearbook." *Id.* at 13a.

Justice Crosby filed a dissent. With respect to the flyers, Justice Crosby noted that "[s]tudents have a broad right to publish their own *privately* produced writings on campus" (Pet. App. at 24a (emphasis in original)) and that "[t]he district's argument to the contrary is a circular transformation of procedure into substance." Pet. App. 23a. Justice Crosby also dissented on the establishment clause issue, again emphasizing the distinction between student speech and government speech. "High school students cannot transgress the establishment clause; only governments can." Pet. App. 25a. This principle, in Justice Crosby's view, rendered the establishment clause argument an illegitimate basis for censorship of the students' flyers: "The majority's belief that government officials can prevent a student from handing a piece of paper to another student during a recess simply based on the allegedly religious nature of the words it contains is without precedent, principled logic, or any serious constitutional justification." *Id.* at 36a. As to the yearbook ad, Justice Crosby emphasized that the breadth of the open forum negated any impression of school endorsement:

> [The yearbook's] advertisement section contains messages from a major real estate developer, bicycle shop, attorney, hair salon, pet store, ice cream parlor, florist, chiropractor featuring accupressure, orthodontist, auto insurance company, and several student groups that look suspiciously like off-campus clubs, among a number of others. The school district obviously endorses none of these businesses or organizations merely because their messages appear in the book.

Pet. App. 39a (footnote omitted).

3. Petitioners sought discretionary review by the California Supreme Court, which denied review on April 27,

1988. Pet. App. 48a. On July 21, 1988, Justice O'Connor granted petitioners' application to extend the time in which to file a petition for certiorari in this Court to and including August 25, 1988. Pet. App. 50a.

REASONS FOR GRANTING THE WRIT

This case concerns censorship by government officials of student expression on campus, because of the subject of that expression: religion. Petitioners Alex Perumal and Russ Read sought to distribute to their public high school classmates, in a manner and at times and places in complete compliance with school district regulations, homemade flyers about informal student Bible studies meeting outside during lunch at their respective campuses. Russ Read also sought to use the personal advertising space he had earned by his work as Photography Editor of his school's yearbook to include a picture of his Bible study group and tell of its meetings and purposes. Officials of Saddleback Valley Unified School District, however, completely censored both the flyers and the yearbook ad, contending (1) that they may ban any and all student expression concerning the discussions, meetings, or activities of nonschool sponsored or nonapproved groups, pursuant to a district policy prohibiting "advertising" by off-campus or nonschool sponsored organizations; and (2) that the establishment clause of the First Amendment requires them to do so in the case of petitioners' flyers and yearbook ad.

This case thus presents important, recurring, and unresolved issues of First Amendment law concerning freedom of speech, religion, and public education: First, whether the First Amendment free speech rights of public high school students extend to the nondisruptive distribution of nonschool sponsored leaflets, and the purchase of advertising space open to the public generally in a school yearbook, where the subject matter of such speech concerns the activities or purposes of nonschool sponsored groups. Second, whether the establishment clause of the First Amendment requires that otherwise protected, law-

ful student expression be censored or excluded from public high school premises or publications because it is religious in content. These questions raise issues of enormous practical and constitutional significance, affecting the practices of literally every school district in the nation and involving the rights of public high school students in every one of these districts. The decision below, upholding censorship of both forms of student expression in this case, is contrary to this Court's cases and reflects growing confusion among lower courts as to the proper scope of students' rights to engage in nonschool sponsored expression, including religious expression and association.

I. THE SPEECH CLAUSE HOLDINGS BELOW CONFLICT SHARPLY WITH THE DECISIONS OF THIS COURT AND LOWER FEDERAL COURTS CONCERNING THE SCOPE OF STUDENTS' RIGHTS TO FREEDOM OF EXPRESSION.

The first speech clause issue in this case is the one reserved by this Court last Term in *Hazelwood School District* v. *Kuhlmeier*, 108 S.Ct. 562 (1988): whether, or under what conditions and subject to what constitutional constraints, high school officials may impose content-based restrictions on newspapers, flyers, leaflets, or other "publications not sponsored by the school, that students seek to distribute on school grounds." *Id.* at 571, n.6. Specifically, the question is whether, as the court below held, school authorities may ban student literature not produced under school authority concerning nonschool sponsored meetings or groups, on the ground that the school has a "closed forum" policy. *See Tinker* v. *Des Moines Independent School District*, 393 U.S. 503 (1969). The second speech clause issue is also one left unresolved by *Hazelwood*: whether school officials' authority to restrict student expression occuring in school-sponsored publications, based on the content of such expression, extends to the paid advertising section in the back of a school yearbook, where the school has, as here,

"opened its advertising section to anyone who wished to purchase space." Pet. App. 7a-8a.

The court below, ignoring *Tinker* and *Hazelwood* entirely, reached a conclusion utterly irreconcilable with those controlling cases; namely, that school officials may ban student speech, protected under the clear terms of *Tinker* or occuring in a form open to the general public, simply because the speech concerns "nonschool sponsored" or "nonschool approved" groups. The decision below contradicts the fundamental and heretofore settled principle that public school students "may not be confined to the expression of those sentiments that are officially approved." *Tinker*, 393 U.S. at 511. *See Hazelwood*, 108 S.Ct. at 567. The policy under which the Saddleback school district suppressed petitioners' speech is unconstitutional on its face, and as applied to both the flyers and the yearbook ad. The decision below seriously misapplies this Court's "public forum" doctrine to student speech clearly not sponsored or endorsed by the school: student distribution of literature falling within the scope of free speech rights recognized in *Tinker*; and student expression in the public advertising section of a school yearbook. Finally, the decision below is in direct conflict (on both questions) with holdings of federal appellate courts.

A. The School District's Policy Prohibiting Student Expression Promoting Nonschool Sponsored Meetings or Activities Is Unconstitutional on Its Face.

Petitioners' leaflets and yearbook ad were banned under the school district's Policy No. 5133.1, which states in relevant part: "No off-campus or private clubs are permitted to function in the School. They are also restricted from advertising in any form." This policy prohibits all "advertising in any form" by off-campus or private "clubs." The term "club" is expansively interpreted by respondents and the California courts to include any "identifiable" group, however informal, that promotes a "common purpose" and "solicits new members." Pet.

App. 6a. The term "off-campus or private" is also interpreted broadly, to include any group that is not "sponsored" by the school. SCF 143, 151. The policy thus restricts the rights of any nonschool sponsored group of students (or its members) to distribute written materials concerning the activities or purposes of their group.[7] This policy is unconstitutional on its face, even without regard to the particular facts of this case. See *Board of Airport Commissioners* v. *Jews for Jesus, Inc.*, 107 S.Ct. 2568 (1987).

As in *Jews for Jesus*, the school district's policy reaches virtually "the universe of expressive activity" by nonschool sponsored groups. 107 S.Ct. at 2572. The overbreadth of the policy is truly extraordinary. It would, for example, prohibit student members of Young Republicans (assuming it is a nonschool sponsored group) from distributing leaflets promoting an off-campus speech by their candidate, indeed from passing out position papers or campaign advertising of any sort. It would prohibit students from publicizing a community event, a civic meeting to discuss a public issue, or a political rally on a particular issue, such as nuclear weapons, apartheid, or aid to the homeless—all of which are nonschool sponsored, off-campus, or private events that involve groups of persons. Sierra Club student members could not publicize Earth Day gatherings, and PUSH student members could not inform fellow students about a boycott of racist

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[7] The terms of Policy 5133.1 go considerably further, and appear to ban any "function[ing]" on-campus of such "off-campus" or "private" clubs. Curiously, however, the school district does not view the lunch hour meetings of the "New Life" Bible studies of which petitioners were members as violating this rule, but *does* view distribution of religious flyers informing other students of these meetings as improper "advertising" for such an off-campus or private club. While this may be a somewhat unusual construction of the language of the policy, the decision of the California Court of Appeal, upholding this reading, is an authoritative state court construction of a provision of state law, binding on federal courts. *New York* v. *Ferber*, 458 U.S. 747, 767 (1982).

businesses. The policy even bans the circulation of handbills urging students to meet together to *form* a new club, or handbills calling a meeting of students to discuss complaints they might have with school officials.

Since the policy bans all "advertising in any form" by informal groups not sponsored by the school administration, it would presumably ban the wearing of a black armband, as agreed on by a small group of individuals in an off-campus meeting to "publicize their objections to the hostilities in Vietnam"—the very mode of expression held protected in *Tinker*, 393 U.S. at 504. As in *Jews for Jesus*, it should be "obvious that such a ban cannot be justified . . . because no conceivable governmental interest would justify such an absolute prohibition of speech." 107 S.Ct. at 2572.

Even were respondents to offer a "limiting construction" of the policy (*Jews for Jesus*, 107 S.Ct. at 2573) —that it applies only to "advertising" promoting *attendance* at a meeting of the "club"—this would be "of little assistance in substantially reducing the overbreadth of the resolution." *Id.* at 2573. There is no conceivable, constitutionally legitimate governmental justification for the district to prevent the distribution of information about, and invitations to, lawful off-campus and informal on-campus meetings.[8]

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[8] Moreover, such attempts to avoid the plain overbreadth of Policy 5133.1 by a limiting construction (not adopted by the state courts) would create serious constitutional difficulties of vagueness. *Compare Jews for Jesus*, 107 S.Ct. at 2573. The policy itself contains no standards that would constrain administrative discretion in applying such a narrowing construction, but would essentially give school officials alone "the power to decide in the first instance whether a given activity" violates its policy (*ibid.*) and admit of "*post hoc* rationalizations by the licensing official and the use of shifting or illegitimate criteria" to suppress protected expression. *Lakewood* v. *Plain Dealer Publishing Co.*, 108 S.Ct. 2138, 2144 (1988). *See also Hoffman Estates* v. *Flipside, Hoffman Estates*, 455 U.S. 489, 498-99 (1982); *Grayned* v. *City of Rockford*, 408 U.S. 104, 108-09 (1972).

The only limitation on the policy's breadth is an illegitimate one: the policy is limited to groups that are not school-sponsored, and thereby limits speech (albeit imperfectly) to subjects and positions officially condoned by school authorities. This is the very evil that this Court repudiated in *Tinker*:

> In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. . . . [S]chool officials cannot suppress "expressions of feelings with which they do not wish to contend."

393 U.S. at 511 (*quoting Burnside* v. *Byars*, 363 F.2d 744, 749 (5th Cir. 1966)). Saddleback's policy is irreconcilable with this central principle of *Tinker*, and is unconstitutional on its face.

B. The School District's Policy Forbidding "Off-Campus or Private Clubs" From "Advertising in Any Form" Is Unconstitutional As Applied to Prevent Students from Nondisruptive Distribution of Leaflets Promoting a Lawful Meeting, or to Censor a Student's Paid Advertisement in an Advertising Section of a School Yearbook Open to the General Public.

Policy 5133.1 is also unconstitutional as applied in this case. Its prohibition against "advertising in any form" expressly applies to speech only by members of "off-campus or private clubs." By definition, the policy only applies to speech by members of *nonschool sponsored* groups. Accordingly, there can be no dispute that this case involves not the school's "authority over school-sponsored . . . expressive activities," but instead its "ability to silence a student's personal expression that happens to occur on the school premises" (*Hazelwood*, 108 S.Ct. at 569), and in a yearbook advertising forum opened "for indiscriminate use by the general public."

Id. at 568 (original quotation marks and citation omitted).[9]

1. Petitioners' proposed exercise of their free speech rights through leafletting falls squarely within the realm of "personal expression" protected by *Tinker* and reaffirmed in *Hazelwood*. In *Tinker*, this Court held that when a student "is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions, even on controversial subjects . . . , if he does so without 'materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school' and without colliding with the rights of others." 393 U.S. at 512-13 (brackets in original; citation omitted). We "do not confine the permissible exercise of First Amendment rights . . . to supervised and ordained discussion in a school classroom." *Id.* at 513. *See Hazelwood*, 108 S.Ct. at 567.

Accordingly, while there may be some constitutionally valid applications of Policy 5133.1, there is no imaginable constitutional justification for banning petitioners' leaflets under the circumstances of this case. There is no intimation in the record that the leaflets would be in any way (much less "materially and substantially") disruptive of the ordinary activity of the school.[10] Neither is there any suggestion that distribution of the leaflets would interfere with the rights of other students. Students not wishing to receive a leaflet may simply refuse it; students displeased by its message may throw it in

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[9] The fact that the students in this case were part of a group does not detract from the constitutionally-protected status of their "personal expression." *Tinker*, too, involved students who belonged to an off-campus group. 393 U.S. at 504.

[10] We address *infra* the argument that the establishment clause requires censorship of student religious speech because of its content.

the trash can.[11] Petitioners agreed to comply with all the school district's prescribed time, place, and manner restrictions. The school district recognizes the right of individuals and school-sponsored groups to distribute such leaflets. The only basis for the schools' ban here is the contents of petitioners' message: that it promotes the activities or purposes of a nonschool sponsored club.

That the leaflets "advertise" informal, nonschool sponsored student meetings provides no justification for their suppression. The school district concedes that petitioners' lunchtime Bible studies are entirely lawful under the school's rules. Petitioners were "told they could meet informally by eating lunch together and could discuss whatever they wished." Pet. App. 2a, n.1. SCF 143, 149, 169, 172. Indeed, the court below noted that "interpersonal communication or informal discussions between students during the school day *cannot* be prohibited." *Id.* at 7a (emphasis added). Since the meetings themselves are lawful, advertising or publicizing them cannot be unlawful.

2. Application of Policy 5133.1 to ban petitioner Read's proposed yearbook ad presents a different legal issue, but is equally unconstitutional. Ironically, the district interprets its ban on "advertising" by non-sponsored groups to extend to a section of the yearbook *devoted to advertising* and broadly open to the *general public*, including a wide variety of "non-sponsored" groups and local businesses. The court below found that "the school opened its advertising section to anyone who wished to purchase space." Pet. App. 7a-8a. *See also* Pet. App. 39a (Crosby, J., dissenting) (giving examples).

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[11] Petitioners' proposed distribution of leaflets was to have taken place in accordance with the school's prescribed condition that "[c]oercion is not used to induce students to accept the printed matter . . ." (Policy 5145.3). SCF 17.

A clearer example of a state-created public forum, or "forum-by-designation," is difficult to imagine. The advertising section of the yearbook is open not only for student organizations but, upon payment of the standard fee, "for indiscriminate use by the general public." *Hazelwood*, 108 S.Ct. at 568 (original quotation marks and citation omitted). As applied in this context, to Russ Read's personal ad, Policy 5133.1 amounts to nothing more than a selectively-enforced, content-based exclusion from a limited public forum for nonschool sponsored expression by nonschool sponsored speakers. Such an application—upheld by the court below—is plainly contrary to this Court's holding in *Widmar* v. *Vincent*, 454 U.S. 263, 267-68 (1981): "The Constitution forbids a State to enforce certain exclusions from a forum generally open to the public, even if it was not required to create the forum in the first place." *See also Police Department* v. *Mosley*, 408 U.S. 92 (1972).[12]

The decision below, upholding application of Policy 5133.1 to ban petitioners' flyers and yearbook ad misapplies this Court's public forum doctrine in both contexts, and cannot be reconciled with this Court's decisions in *Tinker*, *Hazelwood*, and *Widmar*.

C. The Decision Below Is Symptomatic of, and Exacerbates, Continued Conflict and Confusion Among Lower Courts Concerning the Scope of Public School Students' Rights to Freedom of Expression.

The decision below either creates or contributes to at least *two* sets of conflicts among lower courts as to the proper scope of students' speech rights. The decision below conflicts with those federal decisions that have applied *Tinker* to student publication and distribution of materials concerning or promoting nonapproved topics or

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[12] As with the distribution of flyers, there is no basis for censoring Read's yearbook ads on grounds of disruption or violation of rights of others; and the meetings it "advertises" (or, more accurately, commemorates) are entirely lawful.

viewpoints. The decision below also conflicts with federal decisions applying public forum doctrine to prohibit school censorship of paid advertisements in school sponsored publications. Moreover, the faulty analysis of the California court below, in failing to distinguish between these two different types of situations, adds to the growing confusion among lower courts over the relationship of *Tinker* to public forum analysis, a question not resolved in *Hazelwood*. This Court's review is needed to reconcile these conflicts, and remedy the confusion in lower courts on these issues.

1. ***The decision below conflicts with numerous lower federal court decisions recognizing public high school students' First Amendment rights to distribute nonschool sponsored literature on campus.***

The decision below (that of a state court of last resort, under California practice), upholding a policy banning student literature promoting nonschool approved meetings or activities, conflicts with decisions of numerous federal courts applying the rule of *Tinker* to the issue of on-campus distribution by students of various forms of written literature (newspapers, flyers, circulars, signs) not produced under school authority. A majority of the lower federal courts have held that, aside from a very few limited categories of speech (not implicated here), specified under clear and precise criteria, school officials may not enforce content-based bans on the nondisruptive on-campus distribution by students of literature not produced under school authority.[13] The decision below, along

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[13] *Jacobs* v. *Board of School Commissioners*, 490 F.2d 601 (7th Cir. 1973), *vacated on jurisdictional grounds*, 420 U.S. 128 (1975); *Baughman* v. *Freienmuth*, 478 F.2d 1345 (4th Cir. 1973); *Karp* v. *Becken*, 477 F.2d 171, 176 (9th Cir. 1973); *Fujishima* v. *Board of Education*, 460 F.2d 1355 (7th Cir. 1972); *Shanley* v. *Northeast Independent School District*, 462 F.2d 960 (5th Cir. 1972); *Eisner* v. *Stamford Board of Education*, 440 F.2d 803 (2d Cir. 1971); *Riseman* v. *School Committee*, 439 F.2d 148 (1st Cir. 1971) (*per curiam*); *Scoville* v. *Board of Education*, 425 F.2d 10 (7th Cir.),

with *Hernandez* v. *Hanson*, 430 F. Supp. 1154 (D. Neb. 1977),[14] is in direct conflict with these decisions.

2. *The decision below creates a direct conflict among lower courts as to school officials' authority to censor the content of paid advertisements in a school publication.*

The lower court's holding with respect to petitioner Read's yearbook ad is in direct conflict with the decision of the U.S. Court of Appeals for the Ninth Circuit in *San Diego Committee* v. *Governing Board*, 790 F.2d 1471 (9th Cir. 1986). In *San Diego Committee*, the court held that a school newspaper that allowed advertising by members of the general public, including commercial speech and arguably political speech, had created a limited public forum for expressive activity (at least with respect to the advertising portion of the newspaper). 790 F.2d at

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cert. denied, 400 U.S. 826 (1970); *Thompson* v. *Waynesboro Area School District*, 673 F.Supp. 1379 (M.D. Pa. 1987); *see Thomas* v. *Board of Education*, 607 F.2d 1043 (2d Cir. 1979); *cf. Bystrom* v. *Fridley High School*, 822 F.2d 747 (8th Cir. 1987).

A minority of decisions have upheld certain types of content-based restrictions on student literature other than obscene or indecent, libelous, or disruptive speech. But even those cases involve narrow categories of school-prohibited expression, such as commercial speech promoting the use of illegal drugs (*Williams* v. *Spencer*, 622 F.2d 1200 (4th Cir. 1980)), solicitation of funds from other students (*Katz* v. *McAulay*, 438 F.2d 1058 (2d Cir. 1971), *cert. denied*, 405 U.S. 933 (1972)), and solicitation of information about students' sexual conduct and attitudes for purposes of publishing survey results in the school-sponsored campus newspaper (*Trachtman* v. *Anker*, 563 F.2d 512 (2d Cir. 1977), *cert. denied*, 435 U.S. 925 (1978)). (The Second Circuit's decision in *Trachtman* may be correct on independent, alternative grounds under *Hazelwood*, since it involved student expression conducted in the context of a school-sponsored activity.)

[14] Even *Hernandez* limited its holding to "sectarian" expression, striking down the broader school policy, similar to Policy 5133.1, restricting literature distribution by, or on behalf of, all non-school sponsored groups. 430 F. Supp. at 1158, 1160.

1476-1478.[15] Accordingly, the court held that school authorities could not ban a political advertisement by a nonschool sponsored group opposing registration for the draft on the basis of either its subject matter or its viewpoint.

The decision below is inconsistent with *San Diego Committee* on the "public forum" issue, and in its result. The facts of the cases differ only in that the instant case involves advertising in a yearbook, and *San Diego Committee* involved advertising in a school newspaper. In each case, the school permitted advertising by the general public, and attempted to enforce a content-based exclusion against certain would-be advertisers. The court below, however, upheld the exclusion, while the Ninth Circuit rejected it in *San Diego Committee*. This Court should grant review on this issue of federal law, on which the Ninth Circuit has reached a result in conflict with that of a highest state court within that same circuit.[16]

3. *The decision below reflects growing confusion among lower courts as to the relationship of* Tinker *to public forum analysis.*

As noted above, petitioners' rights to free expression with respect to distribution of the flyers rest on a some-

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[15] *San Diego Committee* predated this Court's decision in *Hazelwood*. To the extent language in the Ninth Circuit's opinion speaks generally of school-sponsored newspapers as public fora, that overbroad dictum remains valid only as a matter of state (California), not federal, law. The Ninth Circuit's holding with respect to advertising sections of the newspaper, however, does not appear to be controlled by *Hazelwood*, and thus remains the law in the Ninth Circuit.

[16] Moreover, the decision below conflicts with at least one other federal court decision finding that school authorities may not forbid purely student expression that occurs within a school yearbook, even outside the advertising pages. *See Stanton* v. *Brunswick School District*, 577 F. Supp. 1560, 1570-71 (D. Me. 1984) (student's choice of graphic description of person being executed as caption for her yearbook picture held protected expression within *"de facto"* public forum).

what different ground than petitioner Read's right to expression through his personal ad in the yearbook. The court below erred on both issues, but equally as disturbing is the difficulty the lower court had in identifying the different analysis applicable in each case. The opinion below is symptomatic of the confusion in the state and lower federal courts over the relationship of *Tinker* to this Court's public forum doctrine for analyzing certain First Amendment claims. The court below confused the question of students' *inherent* free speech rights under *Tinker* (rights, in this Court's famous words, that students "do not 'shed . . . at the schoolhouse gate,' " *Hazelwood*, 108 S.Ct. at 567, *quoting Tinker*, 393 U.S. at 506), with *additional* rights that might arise by virtue of school creation or designation of a special "forum" for student expressive activities, in time periods, locations, or media in which students' rights to speech and association are not already covered by the rule of *Tinker*. *See, e.g., Bender*, 475 U.S. 534 (1986) (school-created forum during first period of the school day, twice weekly).

Here, for example, the court below thought to justify censorship of petitioners' *flyers*, as well as the yearbook ad, on the ground that the school district "in enacting board policy 5133.1 changed from a limited open forum to a closed forum." Pet. App. 7a. Yet, as discussed above, the distribution of petitioners' flyers falls squarely within students' rights under *Tinker*. The censorship of the flyers is thus predicated solely on the school district's decision to "close" channels of expression that *Tinker* says are constitutionally required to remain open to students.

This confusion has afflicted other courts as well, including several federal district courts and at least one circuit of the U.S. Court of Appeals. The decisions frequently fail to distinguish between students' rights to freedom of expression under *Tinker* and students' rights of "equal access" to a forum for expression created at the discretion of school authorities. *See, e.g., Brandon* v.

Board of Education, 635 F.2d 971, 980 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981) (addressing issue of whether high school itself is public forum, rather than whether students have group free speech rights on campus during noninstructional time); *Garnett* v. *Renton School District No. 403*, 675 F. Supp. 1268, 1277 (W.D. Wash. 1987), *appeal filed*, No. 88-3552 (9th Cir. 1988) (same); *Clark* v. *Dallas Independent School District*, 671 F. Supp. 1119, 1122 (N.D. Tex. 1987) (motion to alter or amend judgment pending) (same). Other decisions note, and rely on, the distinction. *See, e.g., Mergens* v. *Board of Education*, Slip op. CV 85-0-426 (D. Neb. Feb. 2, 1988) at 15 *appeal filed*, No. 88-1227NE (8th Cir. 1988); *Thompson* v. *Waynesboro Area School District*, 673 F. Supp. 1379, 1387 (M.D. Pa. 1987).

While *Tinker* antedated this Court's cases explicitly applying public forum analysis to questions of student free speech rights, *Tinker* is fully consistent with those decisions, and has been reaffirmed repeatedly by them. *See, e.g., Hazelwood*, 108 S.Ct. at 567, 569. The relationship of *Tinker* to this Court's "public forum" doctrine can be understood in either of two ways. *Tinker* either (i) denotes a broad category of circumstances in which the designation of a "limited public forum" is not a prerequisite for students' free speech rights on school grounds (i.e., students possess inherent First Amendment freedoms which they "do not shed" in the school context, and which are not dependent on school authorities' decision to create a limited public forum); or (ii) establishes, on a categorical basis, that public secondary schools necessarily are limited public fora for a category of speakers (students) and their speech that does not cause "material and substantial interference with schoolwork or discipline" (393 U.S. at 511), subject only to reasonable, content-neutral time, place, and manner regulations.[17]

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[17] As this Court held in *Tinker*: "The principal use to which the schools are dedicated is to accommodate students during prescribed hours for the purpose of certain types of activities. Among those

Regardless of how the doctrine is articulated, it is clear that petitioners' distribution of flyers is constitutionally protected. Free speech does not lose its protection under *Tinker* merely because the school has announced a "closed forum." Left unreviewed, the decision below threatens to exacerbate confusion among lower courts on this point. It is important for this Court to correct this error, and to give the lower courts guidance concerning the relationship of *Tinker* to the public forum doctrine.

II. THE LOWER COURT'S INTERPRETATION OF THE ESTABLISHMENT CLAUSE PRESENTS AN UNSETTLED ISSUE OF BROAD PUBLIC IMPORTANCE

The court below held that the establishment clause of the First Amendment overrides any free speech rights petitioners might have:

> "While students have First Amendment rights to political speech in public schools, . . . sensitive Establishment Clause considerations *limit their right to air religious doctrines*. . . . [S]tudents' free speech and associational rights, cognizable in a 'public forum,' are severely circumscribed by the Establishment Clause in the public school setting."

Pet. App. 13a, quoting *Brandon* v. *Board of Education*, 635 F.2d 971, 980 (2d Cir. 1980), *cert. denied*, 454 U.S. 1154 (1981) (emphasis, ellipses, and omission of internal citations in original). On this ground, the court held that "board policy 5133.1 is a constitutionally permissible school board regulation," and that the school district is

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activities is personal intercommunication among the students. This is not only an inevitable part of the process of attending school; it is also an important part of the educational process." 393 U.S. at 512. In the accompanying footnote, the Court approved the observation that a public school "is a public place, and its dedication to specific uses does not imply that the constitutional rights of persons entitled to be there are to be gauged as if the premises were purely private property." *Ibid.*, n.6.

constitutionally *prohibited* from allowing petitioners to distribute leaflets on campus or publish the yearbook ad. Pet. App. 13a.

The decision below thus presents one of the most hotly disputed questions of constitutional law in the area of free speech and religion: whether the establishment clause authorizes or requires the government to censor otherwise protected expression and association by private persons, not sponsored or encouraged by the government, where the speech is religious in nature, the speakers are high school students, and their speech occurs on school grounds or in a school forum.

This was essentially the question on which this Court granted the writ of certiorari in *Bender*—stripped of some of its potentially complicating features.[18] The Court was unable to reach the merits in *Bender* because the court of appeals had lacked jurisdiction. But the question is no less important now than it was then. It remains unresolved, continuing to trouble school boards and school administrators and to divide lower courts.

A. The Decision Below Is Contrary to This Court's Establishment Clause Decisions and This Court's Decisions Upholding Individuals' Rights to Freedom of Speech on Religious Subjects in Public Places.

The free speech clause has consistently been held by this Court to protect religious expression by private individuals and groups—group meetings, leafletting (in-

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[18] The instant case involves the pure question whether speech on public school premises must be censored solely because it is religious. While that was the core issue in *Bender*, it was clouded by such factors as: (1) the role of teachers in monitoring student religious groups; (2) whether the time spent in religious group meetings counted toward school attendance time required for graduation; and (3) whether formal school sponsorship would create an appearance of endorsement. The instant case has no such complications. Monitors are not involved; there is no question of credit; and the religious discussion groups are purely informal and not school sponsored.

cluding promotion of religious meetings or events), proselytizing—on the same terms as it protects speech on any other subject. *E.g., Jews for Jesus*, 107 S.Ct. 2568 (distribution of religious literature in public airport terminal); *Widmar* v. *Vincent*, 454 U.S. 263 (1981) (private religious group meetings and worship in state university facilities); *Heffron* v. *ISKCON*, 452 U.S. 640 (1981) (religious solictation at state fair); *Martin* v. *Struthers*, 319 U.S. 141 (1943) (door-to-door distribution of handbills advertising religious meeting); *Jamison* v. *Texas*, 318 U.S. 413 (1943) (distribution of religious handbill advancing religious message and promoting upcoming religious gathering in city park); *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940) (playing of religious recording in sidewalk encounters); *Lovell* v. *Griffin*, 303 U.S. 444 (1938) (distribution of religious literature).[19] Similarly, it is firmly established that the establishment clause limits affirmative government promotion of religion, not private religious expression that merely happens to occur on state property. *E.g., Widmar*, 454 U.S. 263; *see Corporation of Presiding Bishop* v. *Amos*, 107 S.Ct. 2862, 2868-69 (1987) ("A law is not unconstitutional simply because it *allows* churches to advocate religion, which is their very purpose. For a law to have forbidden "effects" under *Lemon* [v. *Kurtzman*, 403 U.S. 602 (1971)], it must be fair to say that the *government itself* has advanced religion through its own activity and influence.") (emphasis in original). *See generally* Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 Nw. U.L. Rev. 1, 9-14 (1986) (collecting and discussing authorities).

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[19] This is merely a particular application of the well-settled principle articulated for the Court by Justice Marshall in *Police Department* v. *Mosley*, 408 U.S. 92, 95-96 (1972): "[A]bove all else, the First Amendment means that government has no power to restrict speech because of its message, its ideas, its subject matter, or its content." *Accord Arkansas Writer's Project, Inc.* v. *Ragland*, 107 S.Ct. 1722, 1728 (1987) (collecting cases).

With respect to petitioners' distribution of religious flyers, this case stands squarely at the intersection of *Tinker* and this Court's establishment clause cases. *Tinker* recognizes students' rights to *personal* expression on school grounds, where it is not sponsored by the school. And *Widmar*, *Martin*, *Jamison* and other cases recognize that personal *religious* expression on public property does not violate the establishment clause. Accordingly, if petitioners' rights to distribute flyers on campus are otherwise protected under *Tinker*, there is no principled basis for distinguishing this Court's establishment clause cases on the ground that the speech at issue here is that of high school students and takes place on school property.

Similarly, if petitioner Read's yearbook ad is protected as expression in a government-created forum open to a broad class of speakers, there is no principled basis for distinguishing *Widmar*'s holding that the establishment clause is not violated by private religious expression the government must tolerate under the free speech clause. Here again, the case stands at the intersection of *Tinker* and *Widmar*. Only *state*-sponsored, *state*-led or *state*-promoted religious activity can violate the establishment clause.[20] And the notion that the younger age, and consequent supposed greater "impressionability," of high school students provides justification for censoring their speech that is not disruptive of the school environment is totally inconsistent with *Tinker*. As Justice Crosby aptly noted in his dissent below, "[h]igh school students cannot transgress the establishment clause; only governments can." Pet. App. 25a.

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[20] *See Wallace* v. *Jaffree*, 472 U.S. 38 (1985), *Stone* v. *Graham*, 449 U.S. 39 (1980) (per curiam); *Abington School District* v. *Schempp*, 374 U.S. 203 (1963); *Engel* v. *Vitale*, 370 U.S. 421 (1962); *McCollum* v. *Board of Education*, 333 U.S. 203 (1948). *See also Collins* v. *Chandler Unified School District*, 644 F.2d 759 (9th Cir.), *cert. denied*, 454 U.S. 863 (1981) (prayer at school assembly).

B. Lower Federal and State Courts and School Administrators Are Divided and Confused on the Question of Whether the Establishment Clause Requires Public School Censorship of Nondisruptive Student Religious Speech.

Despite its seeming simplicity, the issue of whether the establishment clause requires suppression of otherwise protected student expression because of its religious content is one that has caused great confusion and division in the lower courts and, consequently, among school administrators.[21] There is a clear, direct conflict among lower courts on the precise question presented here—on-campus distribution by students of nonschool sponsored religious literature. One older federal district court decision has taken the position of the court below, censoring student literature because of its religious content, while another, more recent, federal district court decision has reached the opposite conclusion, refusing to uphold censorship of student religious speech. *Compare Hernandez* v. *Hanson*, 430 F. Supp. 1154, 1161-62 (D. Neb. 1977) (holding First Amendment requires censorship of student distribution of religious literature, based on content) *with Thompson* v. *Waynesboro Area School District*, 673 F. Supp. 1379 (M.D. Pa. 1987) (holding First Amendment forbids censorship of student distribution of religious literature, based on content).

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[21] The instant case is a prime example of this confusion. The Saddleback school district takes the position that the establishment clause forbids student religious expression on school grounds, but applies this principle only to handbills advertising meetings, not to the meetings themselves. The rationale for this is wholly unclear.

Respondents' confusion presents the problem in perfect microcosm: how to reconcile recognition of students' rights to free speech, without content-based censorship, with the (mis)perception that the establishment clause requires content-based censorship where the speech is religious or concerns religion. As this case illustrates, not only have different school districts (and courts) reached differing conclusions, but the approach even of a single school district can be internally inconsistent on the principle in question.

Moreover, there is a deep and extensive conflict of authorities over the broader issue of which the instant case is one example—whether (or under what circumstances) the establishment clause mandates the suppression of otherwise protected student expression on school grounds, because of its religious content. The issue is one that has arisen frequently in lower courts, with no hint of a definitive resolution or a diminution in litigation over the issue.[22]

This Court should grant review to decide this important question of law. The establishment clause issue in this case is one of broad and continuing public significance arising in a variety of contexts extending beyond the facts of this case. The issue is one that affects the policies and practices of literally every school district in every community in the nation, and the rights of students at those schools to engage in speech on religious subjects. This Court's review is essential to resolve this issue of fundamental rights which has continued to divide and confuse the lower federal and state courts (and local school districts), and to correct the erroneous judgment of the court below.

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[22] *Compare Bender* v. *Williamsport*, 563 F. Supp. 697 (M.D. Pa. 1983), *rev'd* 741 F.2d 538 (3d Cir. 1984), *vacated on jurisdictional grounds*, 475 U.S. 534 (1986) (reinstating district court order allowing equal access to high school religious club meeting during activity period of school day); *Amidei* v. *Spring Branch Independent School District*, No. 14-84-7673 (unreported) (S.D. Tex. April 26, 1985) (upholding student religious meetings under Equal Access Act, 20 U.S.C. §§ 4071-4074); *Lanner* v. *Wimmer*, 662 F.2d 1349, 1356 (10th Cir. 1981) (allowing students to list their participation in off-campus released time program in yearbook), *with Nartowicz* v. *Clayton County School District*, 736 F.2d 646 (11th Cir. 1984) (establishment clause prohibits voluntary student religious meetings); *Lubbock Civil Liberties Union* v. *Lubbock Independent School District*, 669 F.2d 1038 (5th Cir. 1982), *cert. denied*, 459 U.S. 1155 (1983) (same); *Brandon* v. *Board of Education*, 635 F.2d 971 (2d Cir. 1980), *cert. denied*, 454 U.S. 1154 (1981) (same); *Garnett* v.

CONCLUSION

Petitioners respectfully request that the writ of certiorari be granted.

Respectfully submitted,

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Renton School District No. 403, 675 F. Supp. 1268 (W.D. Wash. 1987) (same); *Clark* v. *Dallas Independent School District*, 671 F. Supp. 1119 (N.D. Tex. 1987) (motion to alter or amend judgment pending) (same); *Johnson* v. *Huntington Beach Union School District*, 68 Cal. App. 3d 1, 137 Cal. Rptr. 43, *cert. denied for want of jurisdiction*, 434 U.S. 887 (1977) (same). *See Mergens* v. *Westside Community Schools*, No. CV 85-0-426 (D. Neb. Feb. 2, 1988) (Equal Access Act construed not to require school to permit student religious meetings as part of club program; dictum that *Tinker* requires school to allow nonschool sponsored student religious meetings on campus). *See also Gregoire* v. *Centennial School District*, 674 F. Supp. 172 (E.D. Pa. 1987), *aff'd mem.* No. 87-1661 (3d Cir. June 16, 1988) (school district's refusal to rent facilities to religious organizations on equal basis with other organizations violates First Amendment); *Country Hills Christian Church* v. *Unified School District No. 521*, 560 F. Supp. 1207 (D. Kan. 1983) (same).